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No. 899, 412

Supreme Court of the United States

OCTOBER TERM, 1915

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

HERMAN H. OPPENHEIMER, *et al.*
HERMAN H. OPPENHEIMER,
Defendant in Error.

AFFIDAVIT AND NOTICE OF MOTION TO DISMISS APPEAL.

L. LAFLIN KELLOGG,
ABRAM J. ROSE,
Attorneys for Herman H. Oppenheimer, Defendant in Error.

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IN THE SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA, against HERMAN H. OPPENHEIMER, *et al.*	No. 899. October Term, 1915.

THE UNITED STATES OF AMERICA, Plaintiff, against JACQUES SAMUELS, JOSEPH SAMUELS, ABRAHAM SAMUELS, HERMAN J. DIETZ, CHARLES HEPNER and HERMAN H. OPPENHEIMER, Defendants.

MOTION TO DISMISS WRIT OF ERROR AND APPEAL.

AND, NOW COMES HERMAN H. OPPENHEIMER, the respondent above named, by L. Laflin Kellogg and Abram J. Rose, his counsel, and moves to dismiss the writ of error and the appeal taken herein by the above named United States of America on the ground that this Court has no jurisdiction of the same and that the said appeal and the writ of error and assignments of error and citation are defective and otherwise informal, irregular and insufficient and for other reasons apparent on the face of the record.

The two titles at the beginning hereof are the

IN THE SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA,
Plaintiff in Error,

against

HERMAN H. OPPENHEIMER, *et al.*
HERMAN H. OPPENHEIMER,
Defendant in Error.

Affidavit of Herman H. Oppenheimer.

THE UNITED STATES OF AMERICA,
Plaintiff,

against

JACQUES SAMUELS, JOSEPH SAMUELS, ABRAHAM SAMUELS, HERMAN J. DIETZ, CHARLES HEPNER and HERMAN H. OPPENHEIMER,
Defendants.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:
STATE, CITY AND COUNTY OF NEW YORK.

HERMAN H. OPPENHEIMER, being duly sworn, deposes and says: That he resides in the State, City and County of New York.

That he is the defendant in error herein.

That he, together with Jacques Samuels, Joseph Samuels, Abraham Samuels, Charles Hepner, Isaac Anderson, Herman J. Dietz and others were indicted for the same offense several times, as more fully is shown by the indictments in the record on appeal and also other indictments on record in the Court below and some not of record.

That the reason for two titles in this affidavit and the other papers submitted by defendant on this motion is—the first is the title in the writ of error, assignments of error and citation, while the second is the correct title in the case below.

That three of the indictments are printed in the record. That they all are legally identical and charge deponent with the same conspiracy in assisting the bankrupts to conceal assets from the trustee in bankruptcy.

That all of the indictments have either been quashed, dismissed or *nolle prosequed* by the District Court of this District.

That the two indictments numbered 6-333 and 6-334 being indictments Nos. 2461 and 2462 were on motion to quash ordered dismissed by Judge Thomas on October 1st, 1914, as more fully is shown by the opinion of Judge Thomas printed in the record on appeal.

That the time to appeal from the decision and judgment dismissing said indictments expired on November 1, 1914.

That on the said date and for some time thereafter deponent was not re-indicted. That the indictments dismissed by Judge Thomas were not dismissed because of any technical deficiency in the indictments themselves, or the record, but on a legal substantive point of law.

That thereafter on December 21, 1914, another indictment identical with those quashed by Judge Thomas was filed.

That thereupon deponent filed plea in bar, plea in abatement, motion to quash and demurrer to the said last indictment (See record) and the United States made two motions to strike said pleas from the files. (See record.)

Thereupon, by order of the court, the "plea in bar" and "plea in abatement" were withdrawn and the government never filed any demurrer or answer to either. The motion to quash and demurrer then came on for argument on January 30th, 1915. The government failed to file any answering affidavits or to make objection in any way to the form or contents of the motion to quash. The motion to quash was granted by Judge Pope, as more fully appears by his opinion, the simple ground thereof being that the indictment being identical with those quashed by Judge Thomas, and charging the same offense, the law of the case is established by the opinion of Judge Thomas, and never having been appealed from or reversed or set aside and the subject matter, i. e., conspiracy being the same and the parties the same the law remained the same, and that, in the language of Judge Pope, your defendant should not again be subjected to another prosecution while the judgment on the same charge still remains in force and effect and that to hold otherwise would be subjecting a citizen to a series of prosecutions when the law contemplates that once having a decision in his favor he would until such decision is reversed be allowed to go unmolested by another proceeding on the same charge.

That by the determination of Judge Pope on the indictment on appeal, he did not construe any statute but on the contrary his opinion especially called attention to the fact that he did not construe a statute.

Deponent further says that the government filed no answering affidavits to the motion to quash.

That the government never raised any question before the court as to the nature, form or contents, or objected to it being heard as a "motion to quash," and never asserted it to be a "plea in bar."

Deponent further says that the parties to this proceeding were Joseph Samuels, Jacques Samuels, Abraham Samuels, Herman H. Oppenheimer, Isaac Anderson and Charles Hepner, and that the writ of error, the assignments of error, citation and other papers filed herein on appeal are entitled United States against Herman H. Oppenheimer, *et al.*, and omit all the names but Herman H. Oppenheimer, and are therefore defective and ought to be dismissed or stricken from the record.

Deponent further says that he has read the assignment and writ of errors and citation herein. That nowhere therein is there stated an error of the court below in quashing the indictment by construing or interpreting any statute, and deponent believes this court has no jurisdiction of the appeal unless such an error is assigned in the assignment of errors, and if the assignment of errors did contain such an error of the court below this appeal should be dismissed because it is clear, on the face of the record and the opinion of Judge Pope that there was no interpretation of the statute in the decision of this motion to quash which is the sole ground of the right given to the United States for an appeal by the law of March 2nd, 1907, 34 Stat. a L. 2564.

Deponent further says that he believes this court has no jurisdiction. That there is no right of appeal given to the United States by any statute which permits it to bring to this court the question of changing a motion to quash, to which no objection had been made below, to a "plea in bar" and that even as a plea in bar this court would have no jurisdiction since there is no construction of any

statute involved, as was said in this court in the case of *U. S.* v. *Kissel,* 218 U. S. 601, and many other cases cited in the brief.

HERMAN H. OPPENHEIMER.

Sworn to before me this 21st day of March, 1916.

CHAS. T. SMITH,
Notary Public,
[Seal] Queens Co., N. Y., 998.
Certificate filed in N. Y. Co., 41.

Office Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1915.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

HERMAN H. OPPENHEIMER, *et al.*
HERMAN H. OPPENHEIMER, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

On Motion to Dismiss.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

THE UNITED STATES, Plaintiff-in-Error, vs. HERMAN H. OPPENHEIMER et al.	No. 899.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MEMORANDUM ON INCOMPLETE RECORD FOR MOTION TO DISMISS APPEAL.

The attention of the Court is respectfully directed to the omission in the record, printed for use of this Court on the motion to dismiss the appeal, of the opinion of Judge Pope in the Court below, which is the basis of the order on appeal and the motion to dismiss the appeal, although it forms part of the typewritten record, returned by the Clerk of the District Court.

Through an oversight, this opinion was left out when the record was printed, and as the opinion is the principal reason for the motion to dismiss the appeal, we have printed it under separate cover and marked it "Additional extract from Transcript of Record, opinion of Pope, J."

The importance of this omission must be explained, for in the record as printed, is an opinion on a former indictment (opinion by Thomas, J., page 23), and that opinion clearly interprets a statute; but the order entered thereon, October 1, 1914, was never appealed, while the order appealed from was entered on the opinion of Judge Pope (Record, page 25) on a later indictment, and it is asserted as the principal reason to dismiss the appeal, for it does not construe or interpret any statute in quashing the indictment, which is now on appeal.

If this confusion is allowed to exist, it would necessarily direct the attention of this Court to the opinion of Judge Thomas in the record not in issue on this appeal, hence, our submission of the opinion of Judge Pope under separate cover.

Without going into detail, we merely add that it was through no error of defendant that the omission occurred.

Respectfully submitted,

S. Stiffler Kellogg

Wm. D. Rose

Attorneys for Defendant

INDEX AND SUMMARY.

CASES CITED.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, Plaintiff in Error, against HERMAN H. OPPENHEIMER, *et al.*	Case Number 899. October Term, 1915.

THE UNITED STATES OF AMERICA, Plaintiff, against JACQUES SAMUELS, JOSEPH SAMUELS, ABRAHAM SAMUELS, HERMAN J. DIETZ, CHARLES HEPNER and HERMAN H. OPPENHEIMER, Defendants.

The Facts.

This matter comes before this Court upon a writ of error from the United States District Court for the Southern District of New York to review an order of the said District Court, sustaining a motion to quash an indictment found December 21st, 1914.

The appeal is by the United States and is founded on the Criminal Appeals Act, March 2, 1907, C. 2564, 34 Stat. 1246.

The indictment was for conspiracy under Section 37, Criminal Code 5440, Rev. Stats.

H. H. Oppenheimer, who is the sole defendant here, was several times indicted with others for the same offence. (Record, pp. 3, 9, 1.)

The earlier indictments were identical with the one now before the Court, charge the same offense and were dismissed by Judge Thomas October 1st, 1914, on motion to quash made by this defendant. The Government did not appeal from that decision or judgment. See additional Record

On December 21st, 1914, nearly two months after the time for the United States to appeal had expired, the defendant, with others, was again indicted for the same offense, the indictment being legally identical with those quashed previously by Judge Thomas (Record, p. 3, 9) and defendants filed various pleas thereto. (Record, p. 21-23)

The United States then moved to strike out the pleas filed by defendant, Oppenheimer, on the ground that they were filed while the plea of not guilty still remained on record and the "plea in bar" and the "plea in abatement" filed by defendant here, Oppenheimer, were stricken off the record. (Record, p. 20-23)

Judge Pope then heard argument on the demurrer and motion to quash the indictment of December 21, 1914 (the United States Attorney having filed no affidavits in opposition) and granted same on the ground that the law, as promulgated by Judge Thomas, in the former decision and judgment as between the United States and this defendant not having been appealed from or reversed and the parties and subject matter (i.e., the offense) being the same, the indictment being legally identical with the one formerly quashed, the law of the case precluded a prosecution of the defendant on an indictment legally identical with those quashed by Judge Thomas, and charging the same offense.

The record shows that no objection was raised in the court below by the United States that the "motion to quash" was a "plea in bar" or that the United States. treated the "motion to quash" as a "plea in bar." The Government failed to file the usual demurrer or answer in opposition to a "plea in bar" and the matter was heard and decided as a "motion to quash." (See affidavits, notice of motion, opinion of Judge Pope and order thereon, Record, pp. 14. 19. 25 and Additional Record.

The United States then appealed from the "order" of Judge Pope and filed and served a writ of error, assignments of errors and citation, and made the defendant, Oppenheimer, the sole defendant on this appeal. (See Record, pp. 1-3, 25.)

The opinion of Judge Pope quashed the indictment and allowed the "defendants" (plural) to go without day thereunder. (See Additional Record, p. 4.)

The only basis in law for this appeal, if any, is the Criminal Appeals Act set forth herein, which gives to the United States the right of appeal only when a statute was construed by the Court below.

The title of the writ of error, the assignment of errors, and the citation do not contain the names of all the parties defendant, as required by law. (Record, p. 1 3 26)

NOWHERE IS THERE AN ASSIGNMENT OF ERROR ALLEGING THAT THE COURT BELOW ERRED IN CONSTRUING A STATUTE. (Assignment of Errors, p. 4 this brief.)

No statute was construed by the Court below.

The defendant, Oppenheimer, the only one as to whom an appeal was taken, has made this motion to dismiss the appeal the writ and assignment of errors on appeal, on the grounds: A—THAT THIS COURT HAS NO JURISDICTION HEREIN OF THIS APPEAL UNDER THE CRIMINAL APPEALS ACT, AND B—THAT THE WRIT AND ASSIGNMENT OF ERRORS, CITATION AND ORDER DO NOT RAISE AN APPEALABLE QUESTION; C—DO NOT CONTAIN THE NAMES OF ALL THE PARTIES, AND ARE IN OTHER RESPECTS DEFECTIVE.

Statute Involved.

The Criminal Appeals Act of March 2nd, 1907, C. 2564, 34 Stat. 1246:

> "That a writ of error may be taken by and on behalf of the United States from the District or Circuit Courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit: From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded. From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded. From a decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

Specifications of Error.

I. The court erred in holding that the action of the Court in quashing the former indictments Nos. 2461 and 2462 were a bar to a re-indictment and prosecution upon a similar charge although the defendant had not been put in jeopardy under said former indictments.

II. The Court erred in describing its action as the granting of a motion to quash the indictment.

III. The Court erred in not describing its action as the sustaining of a special plea in bar.

IV. The Court erred in holding as a matter of law that the last overt act in the indictment herein could not from its nature and did not legally constitute an overt act under the conspiracy alleged in the indictment.

V. The Court erred in not holding as a matter of law that the last overt act in the indictment herein did constitute an overt act under the conspiracy alleged in the indictment.

VI. The Court erred in holding as a matter of law that the indictment herein is legally identical with the indictments returned Nos. 2461 and 2462, which were dismissed by Judge Edwin F. Thomas, copies of which indictment and opinion are annexed hereto.

VII. The Court erred in sustaining the motion to quash the indictment.

VIII. The Court erred in not denying the motion to quash the indictment herein.

The Questions Involved.

This motion presents the following questions:

1. Has this court jurisdiction to hear an appeal from an order entered on a motion to quash when there was no statute construed under the Criminal Appeals Act, March 2nd, 1907, Chap. 2564, 34 Stat. 1246?

2. Is a writ of error, assignment of error and citation defective: a—When it does not contain all the names of the defendants; b—When it does not specifically raise a question appealable to this Court; c—When it is too general.

There is a secondary question involved; has this Court under the statute cited in the first question, jurisdiction to hear an appeal for the purpose of determining whether a motion to quash was really a plea in bar when the proceedings in the Court below were based on affidavits and notice of motion in a "motion to quash," argued and decided and an order entered thereon as such without any objection or exception on the part of the United States to the form or the contents thereof and without raising the question below that the same was improper or a plea in bar.

Defendant contends that this Court has no jurisdiction to hear an appeal from an order on a motion to quash an indictment unless a statute was construed or interpreted in the Court below, and then to hear such appeal only on the question, was the statute properly construed in the Court below.

The second contention of the defendant is that the writ, assignment of errors, and citation are defective.

THE ARGUMENT.

POINT I.

The Court below did not construe a statute.

The opinion of Judge Pope in the Court below is so clear that the Court did not construe a statute that we merely submit the opinion to sustain this point. (Record, p. 14.)

Additional

POINT II.

As an appeal from a decision or judgment on a motion to quash, this Court has no jurisdiction because there was no construction or interpretation of any statute.

The opinion of Judge Pope clearly bears out our contention that the Court did not construe a statute and especially avoided any construction of any statute and shows there was no necessity for the construction of a statute. It is clearly founded on basic law only—the law of the case.

This Court, has repeatedly held it will not go into constructions of indictments, overt acts, similarity, errors of law, or matters of discretion *unless a statute is involved* on appeals under Act of March 2d, 1907.

In the case of *United States* v. *Carter*, 231 U. S., 492, appeal dismissed by this Court, the demurrer was upheld in the Court below because certain counts were "bad in law." This Court refused, however, to examine the whole case to see if any statute

was interpreted or construed and said, by Mr. Chief Justice White, page 493:

> "It is settled we cannot revise the mere interpretation of the indictment and are confined to ascertaining whether the Court erroneously construed the statute and our power to revise can alone rest upon the theory that what was done amounts to a construction of the statute. (*Keitel* case, 211 U. S., 371; *Stevenson*, 215 U. S., 190), but it is obvious that the ruling that the counts which were quashed were bad in law did not necesarily involve a construction of the statute, and may well have rested upon the opinion of the Court as to the mere insufficiency of the indictment."

The facts in the case at bar are more favorable to defendant. In the *Carter* case the Court below did not write an opinion yet, this Court refused to look into the counts of the indictment to ascertain whether there had been an interpretation of a statute, *while in this case the written opinion shows clearly that the Court did not construe or interpret any statute.*

In *United States* v. *Patten*, 226 U. S., 525, at page 535, Mr. Justice Van Devanter states:

> "The limitation upon our jurisdiction under the criminal appeals act are such that we must accept the Circuit Court's construction of the counts and consider only whether its decision that the acts charged are not condemned as criminal by the anti-trust act is based upon an erroneuos construction of that statute."

In *United States* v. *George*, 228 U. S., 14, Mr. Justice McKenne, delivering the opinion of this Court, states, at page 19:

> "This statute (Act of March 2, 1907, C. 2564, 34 Stat., 1246) seems to require an explicit declaration of the law upon which an indictment is based and a ruling on its validity or construction. To contend for one law as applicable in the trial Court and another law in the Appellate Court would seem not only to be opposed to the requirement of the statute but to be inconsistent with orderly procedure and to confound the relation of trial and appellate tribunals."

United States v. *Keitel*, 211 U. S., 370, Mr. Justice White, delivering the opinion of the Court, in discussing the Criminal Appeals Act, Laws of March 2, 1907, C. 2564, 34 Stat. at L. 1246, the law here involved, says, at page 386:

> • • • "The construction of the statutes, therefore, is the real question for decision." • • •

and on page 398:

> "That act, we think, plainly shows that in giving the United States the right to invoke the authority of this Court by direct writ of error in the cases for which it provides contemplates vesting this Court with jurisdiction only to review the particular questions decided by the Court below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to review of decisions of the lower Court concerning the subjects embraced within the clauses of the statute and not to open here the whole case.
>
> "We think this conclusion arises not only

> because the giving of the exceptional right to review in favor of the United States is limited by the very terms of the statute to authority to re-examine the particular decisions enumerated in the statute but also because of the whole context which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute leaving all other question to be controlled by the general mode of procedure covering the same, etc., etc. * * *."

See also quotation from *U. S.* v. *Kissel*, on page 17 of this brief.

All the cases in this Court are to the same effect, that this Court will "not open the whole case here," as said in the *Keitel* case, or go into any thing except *a decision clearly interpreting a statute.*

The aforesaid opinions have been followed in every case in this Court. See:

U. S. v. *Biggs*, 211 U. S., 507, pp., 518-522.
U. S. v. *Sullenberger*, 211 U. S., 522.
U. S. v. *Forrester*, 211 U. S., 400.
U. S. v. *Herr*, 211 U. S., 404.
U. S. v. *Freeman*, 211 U. S., 525.
U. S. v. *Mason*, 213 U. S., 116.
U. S. v. *Muscall*, 215 U. S., 26.
U. S. v. *Stevenson*, 215 U. S., 190.
U. S. v. *Kissel* 218 U. S., 601.
U. S. v. *Moist*, 231 U. S., 702.
U. S. v. *Birdsall*, 233 U. S., 223-230.
U. S. v. *Foster*, 233 U. S., 515-523.

THE OPINION OF THE COURT BELOW IS SO CLEAR THAT IT DID NOT CONSTRUE A STATUTE, WE SUBMIT IT WITH THE CASES CITED, AS THE VERY BEST ANSWER TO THIS APPEAL, AND THE REASON FOR THIS COURT'S LACK OF JURISDICTION, AND GROUND FOR ITS DISMISSAL.

POINT III.

This Court has no jurisdiction to hear an appeal under Laws 1907, C. 2564, whether "a motion to quash" can be held to be a "plea in bar," especially when that point was not raised in the Court below.

This point, referring to assignment of errors II and III, is clearly covered by the long line of decisions in this Court following the case of *United States* v. *Keitel, supra,* for this question would certainly not involve the construction of any statute but on the contrary would directly involve the construction of a pleading, and that pleading not even the indictment.

The United States evidently attempts, by these two assignments of error to now raise the question for the first time,—was this "motion to quash" not a "plea in bar" so as to bring it within the fourth clause of the Act of March 2, 1907, giving a right to appeal to the United States on a "plea in bar"?

The record is barren of any showing that the question was raised below. Can it now be raised? The decisions of this Court holding that a question not raised below cannot be raised in this Court for the first time are many and the opinion of this Court in *U. S.* v. *George, supra,* is clearly to this effect. In effect will the United States be allowed to argue a motion to quash with the law applicable thereto and after decision against it come to this Court, and here for the first time, claim the "motion to quash" is a "plea in bar" and thereby obtain an appeal? This question is answered by the following, among numerous cases:

Carlisle v. *United States*, 194 Fed. at 829, CCA., GUFF, *J.*, speaking for the Court, after stating that no exception was taken below on the ruling of the Court on a "motion to quash," says:

> "The object of an exception is to challenge the correctness of the Court's ruling, and to permit the trial judge, when his attention has been specially called to the alleged error, to correct his disposition of the matter, should he deem it proper to do so, and in case he does not do so to provide a method for review in the Appellate Court. SUCH AN EXCEPTION IS ABSOLUTELY INDISPENSABLE UNDER THE PRACTICE IN THE UNITED STATES COURTS." (Capitals ours.)

In *United States* v. *Muscall*, 215 U. S., 26, *supra*, Mr. Justice Brewer, in delivering the opinion of this Court on a similar appeal, says, at page 31:

> *"But our inquiry is limited to the particular question decided by the Court below."*

Mr. Justice McKenna in *United States* v. *George*, *supra*, on page 19, in a similar situation, says:

> * * * "To contend for one law as applicable in the trial Court and another law in the Appellate Court would seem not only to be opposed to the requirement of the statute but to be inconsistent with orderly procedure and to confound the relation of trial and appellate tribunals."

IF ANYTHING DIFFERENT THAN A MOTION TO QUASH, THEN THIS WAS A MOTION TO DISMISS. But the *form* of pleading

res adjudicata is immaterial so long as the necessary facts appear in the plea.

In *United States* v. *Carter*, 231 U. S., at page 493, Mr. Justice White says:

> "To suggest that if the mere form in which a ruling is clothed be made the test of the power to review it will result that the exertion of the authority may be rendered unavailing in every case is without foundation. It is not to be assumed that trial courts will not seek rightfully to discharge their duty * * *."
>
> (Foster's Federal Practice, p. 669, Sec. 187.)
>
> *Mound City Co.* v. *Castleman*, 171 Fed., 520.

It is too late on appeal to object to the form of the pleading below when the objection was not raised there. (Foster's Federal Practice, 2546.)

> *Marine Bank* v. *Fulton Bank*, 2 Wallach, 252, at 258.
>
> *Coffey* v. *United States*, 116 U. S., 436.
>
> *Goldsmith* v. *Koopman*, 152 Fed., 173.
>
> *People* v. *Adams*, 176 N. Y., 351, affirming 35 App. Div., 390.

And this is so where an exception was not reserved below, even in capital cases in New York:

> *People* v. *Tobin*, 176 N. Y., 278.
>
> *People* v. *Grosman*, 168 N. Y., 47.

and even when constitutional question is involved:

> *People* v. *Shulck*, 166 N. Y., 180.

and especially so when a point of law is raised:

People v. *McDonald*, 159 N. Y., 309.
People v. *Rice*, 159 N. Y., 400.
People v. *Decker*, 157 N. Y., 186.

Clark v. *Fredericks*, 105 U. S., 4, Mr. Chief Justice Waite, on page 5, says:

> "The matter referred to in the second assignment does not seem to have been brought to the attention of either of the Courts below and the objection now made comes too late in this Court for the first time. If the defect complained of had been specifically pointed out to the District Court, when the findings were filed, it would no doubt have been corrected. There is nothing in all this very confused record to indicate that the point was ever made until the brief for the plaintiffs in error was filed here."

All parties and the Court treated the matter as a "motion to quash" in the Court below.

The United States Attorney never treated this as a "plea in bar" in the Court below—never raised the point below that the "motion to quash" was a "plea in bar" and should be estopped from raising it here even if this Court had jurisdiction to determine it.

To now hold that this was a plea in bar below would be giving a new right of appeal to the United States—the right to have construed in this Court any and all pleadings, demurrers, pleas in abatement, pleas of former jeopardy, *res adjudicata*, arrest of judgment, jurisdiction, *nole*, *contendere*, special plea of statute of limitations, plea of insanity, motions to quash or any form of plea so

as to give the government an appeal by merely claiming on appeal that it was a "plea in bar."

To carry the claim of the U. S. to its conclusion *EVERY FORM OF PLEA IS APPEALABLE TO THIS COURT,* because *EVERY PLEA* except *GUILTY OR NOT GUILTY IS A "BAR" TO THE INDICTMENT IN QUESTION, HENCE EVERY "PLEA" MUST BE A "PLEA IN BAR."* WE SUBMIT THIS COURT WILL NOT ADOPT SUCH SPECIOUS REASONING.

In the case at bar this theory becomes even harsher. The record shows (pages 20-23) that defendant filed a "plea in bar" which was withdrawn from the record, but the "motion to quash" remained on record and was argued and decided. How can it now be held to be his "plea in bar," when that was withdrawn?

> *Grand L. Ins. Co.* v. *Cooper*, C. C. A. 51 Fed., 332-335.
>
> "An Appellate Court will not hold that the Court below erred in the interpretation of its own order, unless it is clear that injustice resulted."

When a defendant files a plea in bar the United States must either demur to it or answer, but neither was done by the United States in these proceedings—how can the appellant now have judgment?

The decision was really *"res adjudicata,"* a defense which can be set up at any time in any plea or in a special plea without other name. In fact it can be of the Court's own motion at any time, when the law may come to its attention. It is something as important as the just and proper administration of law itself and is founded on that broad principal implied by the Court below when

the Judge in his opinion said (see additional Record, p. 3):

> "* * * the defendants should not be subjected to another prosecution while the judgment quashing the indictment and discharging them still remains in force and effect. To hold otherwise is to subject the citizen to a series of prosecutions when the law contemplates that once having a decision in his favor he would, until such decision is reversed, be allowed to go unmolested by another proceeding on the same charge."

It is earnestly submitted therefore that this appeal must be considered, if at all, as an appeal from that which the pleading itself, the Judge who wrote the opinion, the Judge who signed the order and the writ and assignments of error sets it out to be—and the parties treated it—based on an order made on a "motion to quash."

BUT, EVEN AS AN APPEAL ON A DECISION OR JUDGMENT ON A PLEA IN BAR WE WILL SHOW THAT THIS COURT HAS NO JURISDICTION THEREOF.

POINT IV.

As an appeal from a decision or judgment on a "plea in bar" this Court has no jurisdiction because it did not construe a statute.

The law of 1907, March 2, 1907, while it separates "pleas in bar" when the defendant has never been put in jeopardy from the "motions to quash," etc., there are two good reasons for this separation.

Plea in bar, through former jeopardy, does not necessarily involve the interpretation of a statute

and it was intended to give the United States this added right to appeal to those involved in decisions on demurrers, motions to quash and pleas in abatement, when defendant had not been put in jeopardy.

The second reason evidently was that "pleas in bar" which do not raise the plea of former jeopardy and are not constructions of a statute are practically unknown.

In *Carlisle* v. *United States*, 194 Fed., 829, Judge Goff said:

> "A motion to quash is addressed to the discretion of the Court, and will never be reviewed in an Appellate Court save only in cases where there has been such a failure to properly exercise the judicial discretion as to cause real injustice."

To give any other interpretation to that part of the Criminal Appeals Act relating to "pleas in bar" than that stated at the head of this Point would be to emasculate the entire act and give the government an appeal in every plea, for, as heretofore pointed out, every "plea" when sustained is a "bar" and under any other construction every "plea" becomes a "plea in bar" and appealable.

However, this Court has determined this point in the case of *United States* v. *Kissel, supra,* in which Mr. Justice Holmes, delivering the opinion of the Court, concurred in by all the Justices, on page 606, says:

> "We deem it unnecessary to state the pleadings with more particularity because the only question before us under the Act of March 2d, 1907, C. 2564, 34 Stat. 1246, is whether the plea in bar can be sustained. That this Court is confined to a considera-

tion of the grounds of decision mentioned in the statute when an indictment is quashed was considered in *United States* v. *Keitel*, 211 U. S., 370, 399.

WE THINK THAT THERE IS A SIMILAR LIMIT WHEN THE CASE COMES UP UNDER THE OTHER CLAUSE OF THE ACT, FROM A JUDGMENT SUSTAINING A SPECIAL PLEA IN BAR WHEN THE DEFENDANT HAS NOT BEEN PUT IN JEOPARDY. THIS BEING SO, WE ARE NOT CONCERNED WITH THE TECHNICAL SUFFICIENCY OR REDUNDANCY OF THE INDICTMENT OR EVEN IN THE VIEW THAT WE PRESENTLY SHALL EXPRESS, WITH CONSIDERATION OF THE NATURE OF THE OVERT ACTS ALLEGED." (ITALICS ours.)

On the authority of this case alone we submit this appeal should be dismissed.

And in the *Keitel* case, *supra*, as well as the long line of decisions which follow, already set forth, the language is too clear to need elaboration that this Court on appeals of this kind is restricted to the sole question, did the Court below construe a statute in quashing the indictment?

We therefore submit that as an appeal from a "plea in bar" this Court has no jurisdiction in this case since no statute was construed.

POINT V.

The Writ of Error, Assignment of Errors and Citation are defective and insufficent to raise the only point appealable in such appeals as this, are too general, and are defective because they omit the names of some of the parties.

They fail to state or raise the only point which would give this Court jurisdiction, i.e., that the Court below construed a statute.

They fail to give the names of all the parties.

They are too general under the decisions.

In order that this Court may have jurisdiction the writ of error must contain words to the effect, "that the Court erred in the interpretation, construction or invalidity of a statute by, etc., etc.," for this is the only ground on which this Court will uphold jurisdiction of this appeal under all the cases reported.

None of the errors assigned raise this question and the decision of the Court below clearly shows that no statute was construed *and that may be the reason the United States* purposely did not assign that error.

This seems so evident from a reading of the assignments of error and the opinion that we refrain from taking up each assignment of error separately, except to say that the only two which might be asserted to include such an idea are numbered I and VII, and as to these two, the words are missing and the interpretation thereof to raise the necessary question means that this Court will do what it has repeatedly announced it will not do, to wit, look through and open the entire case to ascertain whether a possible error had been committed which would give this Court jurisdiction when it is not distinctly raised in the writ and assignment of error and the opinion shows to the contrary.

And this was held so even where the party's firm name was stated instead of individually:

"The Protector," 11 Wall., 82.
Moore v. *Simons*, 100 U. S., 145.

and where the writ of error omitted the parties named in the citation the Court dismissed the writ, although in this case the citation is also defective.

Kaile v. *Wettmore*, 6 Wall., 451.

Therefore, no question is raised by the assignment of error which would give jurisdiction to this Court and it is too general and the writ of error, assignments and citation being defective in not containing the names of the various defendants, and too general to raise an appealable question on an appeal like this from an order quashing an indictment, the writ of error and the appeal should be dismissed.

The anomolous situation now presented is, an opinion has been filed quashing the indictment as to the *"defendants"* (see Record, p. 4) and the Clerk has so entered on the docket and indictment (see Record, p. 23), yet here only one defendant is prosecuted on this appeal (the charge being conspiracy), which appeal if successful would not affect the others while, if unsuccessful, the United States can appeal as to each of the other defendants separately, and if successful can then again indict this defendant.

THE MOTION TO DISMISS SHOULD BE GRANTED because:

First—The Writ of error, the assignment of errors and the citation do not contain the names of all the parties, and the assignments of error are too general.

Second—The assignment and writ of error do not clearly raise the only question which would give this Court jurisdiction under the Criminal Appeals Act, i.e., "That the decision or judgment appealed from wrongly construed, interpreted or was based on the validity of a statute.

Third—Because this Court will not entertain an appeal from an order on a "motion to quash" to determine whether it was in fact a motion to quash or something else, as this Court has no jurisdiction to reverse errors of law under the Criminal Appeals Act unless a statute is involved, and at most the determination by the Court below that it entertained and decided a "motion to quash" would be error of law without interpretation of a statute, and the United States having treated the matter as a motion to quash in the Court below without objection or exception, it is now estopped from asserting it to be a "plea in bar."

Fourth—Considering this as an appeal on a decision or judgment on a "plea in bar" this Court has no jurisdiction under the Criminal Appeals Act because it does not involve the interpretation of a statute, and finally,

Fifth—BECAUSE AS AN APPEAL FROM A DECISION OR JUDGMENT ON A "MOTION TO QUASH" THIS COURT HAS NO JURISDICTION BECAUSE IT APPEARS PLAINLY BY THE ENTIRE RECORD AND THE OPINION BELOW THAT NO STATUTE WAS INTERPRETED.

Respectfully submitted,

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